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No. 80-1882

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

CHARLES CHAPMAN, et al.,

Petitioners,

—v.—

THE DOW CHEMICAL COMPANY, DIAMOND SHAMROCK CORPORATION, MONSANTO COMPANY, THOMPSON-HAYWARD CHEMICAL COMPANY, and HERCULES INCORPORATED,

Respondents.

(IN RE "AGENT ORANGE" PRODUCT LIABILITY LITIGATION)

PETITIONERS' SURREPLY TO THE SOLICITOR GENERAL

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ARGUMENT

At the conclusion of the last Term, this Court asked the Solicitor General to express the view of the United States Government with regard to the grant of certiorari in the "Agent Orange" litigation. The Solicitor General has now responded to that request in a document which is inexplicable and internally contradictory.

Presumably, the Court was not asking the Solicitor General for a brief on federal common law or the nuances of federalism. Those issues had been ably briefed and are the subject of thorough opinions by some of the finest trial and appellate

judges in this country. The issue is whether the "Agent Orange" case raises a "federal question" under 28 U.S.C. § 1331.[1] The United States has not challenged this premise; they have endorsed it. See, Brief for the United States as *Amicus Curiae,* pp. 7-8.

Contrary to the unsupported assertion of the Solicitor General that the "[p]etitioners do not contend that their claims arise under, or are governed by, the Constitution" (*Id.*, p. 3), the veterans *do* contend that their claims arise under the Constitution of the United States.[2] Two hundred years ago this nation refused to relegate all its military responsibilities to the political vacillations and uncertainties of thirteen new states[3]

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1 See Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, "Questions Presented," pp. i, 3, 11, 7a-19a; Brief in Support of Petition for a Writ of Certiorari of the Ryan Family, on behalf of all the plaintiff veterans and their families from New York, Alabama, Alaska, Arkansas, Colorado, Georgia, Idaho, Maine, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, South Dakota, Rhode Island, Utah, Virginia, West Virginia, Wisconsin, *Amici Curiae,* pp. iii, 3-4, 6-7, 8-9; Brief in Opposition to Petition, "Statutory Provision Involved," p. 2; Petitioners' Supplementary and Reply Brief Supporting Petition, pp. 5-7, 10-11.

2 See Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, p. 11 n. 8; Brief in Support of Petition for a Writ of Certiorari of the Ryan Family, on behalf of all the plaintiff veterans and their families from New York, Alabama, Alaska, Arkansas, Colorado, Georgia, Idaho, Maine, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Rhode Island, Utah, Virginia, West Virginia, Wisconsin, *Amici Curiae,* pp. 8-9; Brief in Opposition to Petition, "Statutory Provision Involved," p. 2; Petitioner's Supplementary and Reply Brief Supporting Petition, pp. 3-4.

3 The Founding Fathers raised the same question in 1787 while the country was still governed by the Articles of Confederation, under which there was proportional sharing by the states, ". . . for all charges of war, and all other expenses that shall be incurred for the common defence or general welfare . . ." Article VII, "Articles of Confederation," in *United States: Formation of the Union,* Charles C. Tansill, ed., (Government Printing Office, 1927). In the *Federalist Papers,* Alexander Hamilton challenged this method of providing for national defense,

and adopted Article I, Section 8 of the Constitution. Today, the Solicitor General would have this Court subordinate the national interest to the variegated laws of not thirteen but fifty states.

The Solicitor General completed his contribution to this case when he endorsed the premise that the "Agent Orange" case raises a "federal question." He answered the only question on which his input had been sought. Nevertheless, he ventured his own opinion that although the federal issues were of enormous importance, federal interests would not be damaged by the application of state law.[4] His opinion was bolstered by similar opinions from the Department of Defense and the Veterans Administration. The Solicitor General did not take the trouble to explain how damage to the important federal interests would be averted if, for example:

> . . . veterans from different states who stood side by side in Viet Nam would be treated differently according to the statutes of limitations of their respective domiciles. Today, the Courthouse door is closed to the veterans in nineteen states while those in the other states can proceed with this litigation.

". . . will not weakness, disorder, and undue distribution of the burdens and calamities of war, an unnecessary and intolerable increase of expense, be its natural and inevitable concomitant? Have we not had unequivocal experience of its effects in the course of the revolution . . . ? Every view we may take of the subject, as candid inquirers after truth, will serve to convince us, that it is both unwise and dangerous to deny the federal government an unconfined authority as to all those objects which are intrusted [sic] to its management."

Edward M. Earle, ed., *The Federalist* (New York: The Modern Library, 1941), No. 23, 144-145.

4 The Solicitor General argues that although the federal interests are real and significant, the actual dollar impact of this case on the Treasury, war material procurement, and military discipline is "speculative". Brief for the United States as *Amicus Curiae*, p. 8. That the quantum of injury has not been liquidated does not detract from its reality.

> . . . one state would apply strict liability on the failure-to-warn issue, while another state would apply negligence doctrines. The very same batch of "Agent Orange" which simultaneously affected thousands of combat soldiers would be declared both "defective" and "not defective".
>
> . . . one state would permit proof of causation on the basis of statistical evidence and apportion liability according to market share, while another state would deny such recovery.

The Solicitor General has not answered such questions because he cannot. Once he has admitted massive federal interests in this case there is no way to minimize their impact. The questions must be side-stepped and the Solicitor General has sought to do just that.[5]

The unidentified opinions which issued forth from the bowels of the Defense Department and Veterans Administration bureaucracy must be disregarded. It is common knowledge that relegating the veterans' claims to state law under diversity jurisdiction will seriously cripple the "Agent Orange" litigation.[6]

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5 Citing *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966), the Solicitor General suggests that many of the problems presented by application of state law in this litigation can be "patched-up" by an *ad hoc* application of "federal" law to particular issues, at least where federal policy can be ascertained from Congressional enactments. In diversity cases, however, past practice has been for each federal District Court to apply its local state statute of limitations, *Guaranty Trust Co.* v. *York*, 326 U.S. 99 (1945). It is difficult to see how that requirement, with its inevitable consequences, can prevent injustice to the veterans in the "Agent Orange" cases. The Solicitor General appears to suggest that federal law should apply to this case in all but fact, a possible but impractical and intellectually ungratifying result. A uniform rule of federal common law, however, can and should be applied to the veterans' claims as "federal question" litigation under 28 U.S.C. § 1331 in the absence of a specific contrary Congressional mandate. *City of Milwaukee* v. *Illinois*, No. 79-408 (April 28, 1981). There is no good reason why, in a case so heavily imbued with federal interest and bearing on future national security, this Court should accept a "second best" approach.

6 Brief *Amici Curiae* by the Ryan Family, pp. i-ii, 10-11.

The attitude of the Defense Department and the Veterans Administration toward the "Agent Orange" claims is well known. They would like this case to go away. That the commissions of some and the omissions of others will be replayed in all their sordid detail in the judicial theatre is not something eagerly anticipated by agencies that have continually mouthed a theme orchestrated by the chemical companies. Both the Defense Department and the Veterans Administration already have been embarrassed by their treatment of the Viet Nam combat veterans. The thought that these veterans and their families will have the opportunity to present the testimony of prestigious experts who will clarify the relationship between the United States and the defense contractors with regard to the "Agent Orange" claims can give them no solace.

CONCLUSION

The Solicitor General admits that the question is a close one. If it is close then the very least that tens of thousands of veterans who placed their lives on the line have a right to demand of this Court is that their "close question" be decided by the supreme authority over such questions.

Certiori should be granted.

Respectfully submitted,

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